HUANG YAN TEO

v.

LOW NAM HUI & SONS SDN BHD (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
[CIVIL SUIT NO: [MT-1] 22-121-2005]
25 JANUARY 2007

CIVIL PROCEDURE: *Summary judgment - Contract - Consultancy agreement - Claim for consultancy fees - Delay - Whether time of essence - Pleadings of particulars – Relevancy and validity of cheque detailing payment - Triable issues*

CONTRACT: *Agreement - Consultancy agreement - Claim for payment of consultancy fees - Summary judgment - Delay - Whether time of essence - Pleadings of particulars – Relevancy and validity of cheque detailing payment - Triable issues*

This was an appeal by the defendant against the decision of the Senior Assistant Registrar allowing the plaintiff's application for summary judgment in respect of the plaintiff's claim for the sum of RM3.25 million, being the consultancy fees pursuant to a consultancy agreement dated 31 December 1999 entered into between the defendant and the plaintiff and six other consultants. The principal ground advanced by the defendant in opposing the plaintiff's application for summary judgment was that the plaintiff failed to fulfil its obligations. The defendant contended that the plaintiff was in breach of the terms of the consultancy agreement by failing to obtain the listing approval by 31 December 2001, giving rise to a triable issue. The plaintiff, however, averred that the listing approval was obtained from the Securities Commission on 30 August 2000 and that the delay was due to the inability of the defendant to comply with the listing approval conditions of the Securities Commission dated 30 August 2000, which necessitated three further approvals on 6 November 2000, 31 January 2002 and 13 November 2002.

Held (dismissing the appeal):

(1) Upon evaluation of the affidavit evidence, it was clear that the plaintiff had fulfilled his contractual obligation under the consultancy agreement by obtaining the approval of the

Securities Commission on 30 August 2000. It was the defendant's inability to comply with the terms of approval that necessitated three further approvals and, consequently, the delay in the listing was squarely attributable to the defendant. This court unreservedly accepted the reasons for the delay as averred by the plaintiff. It was also pertinent to emphasize that the plaintiff's averment as regards the delay being occasioned by the defendant was never specifically denied, which failure was tantamount to an admission of the averment so made. It is trite law that a litigant ought not to benefit from its own wrong and that a party ought not to be permitted to take advantage of its own breach (*Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* (refd); *Sim Chio Huat v. Wong Ted Fui* (refd)). (paras 5 & 6)

(2) With regard to the defendant's subsidiary argument that time was of the essence, in the factual matrix herein, it could not be denied that the defendant had continued to accept the performance of the plaintiff and the other consultants until the listing of the company in Bursa Malaysia on 25 July 2003. By reason thereof, time had become at large and was no more of essence in the regulation of the parties' contractual obligations. The fact that there was no letter of termination and that the plaintiff was made a director of the listed company further supported that time was at large (*Sim Chio Huat (supra)* (refd); *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* (refd)). (para 7)

(3) The defendant's contention that it had done the listing was a bald contention devoid of particulars. It is trite law that the defendant's averment must condescend with particulars (*John Walling Ford v. Director of Mutual Society* (refd)). A scrutiny of the defendant's defence and affidavit revealed the hollowness of the defendant's contention as they were devoid of particulars as to when and how the defendant did the listing by itself. The aforesaid contention was a sheer act of desperation to prop up an issue when none existed. (para 8)

(4) On the question of an undated Hock Hua Bank cheque for RM5,250,000 to one CRMC (Malaysia) Sdn Bhd ('CRMC') that the defendant contended was irrelevant, it was only appropriate to refer to the consultancy agreement wherein CRMC was named as one of the consultants in the

agreement. Thus, the payment of the cheque was relevant in that it signified the completion of the performance of the consultancy agreement by all the consultants named therein including the plaintiff. The cheque, although made payable to cash, was nevertheless a valid cheque (*Yee Chow Fah v. Multihorizon Sdn Bhd* (refd)). Similarly, an undated cheque is a valid cheque (s. 3(4)(a) Bills of Exchange Act 1949 (refd); *Tan Chong Keng v. Vincent Lim Bak Keng* (refd)). The defendant's averment that the cheque was not encashed and that its bank account in Hock Hua Bank had been closed was but a bare averment devoid of documentary proof such as bank statements and other supporting documents. Surely the defendant as the issuer of the cheque was in a position to ascertain from its bank statements whether the cheque had been encashed, and the payment and encashment thereof was solely within the knowledge of the defendant. (paras 9, 10 & 11)

[Defendant's appeal herein was without any merits.]

Case(s) referred to:

Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***

John Walling Ford v. Director of Mutual Society [1880] 5 AC 685 ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

Tan Chong Keng v. Vincent Lim Bak Keng [1986] 2 MLJ 327 ***(refd)***

Yee Chow Fah v. Multihorizon Sdn Bhd [1996] 6 MLJ 175 ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, s. 3(4)(a)

For the plaintiff - Tan Hee Soon; M/s Tan Hee Soon & Co

For the defendant - Wong Kim Fatt (Tee Yee Koon with him); M/s Gulam & Wong

Reported by Suresh Nathan

JUDGMENT

Syed Ahmad Helmy J:

[1] Enclosure 24 relates to the defendant's appeal against the decision of the learned senior assistant registrar in allowing the plaintiff's application for summary judgment in respect of the claim as per the statement of claim.

[2] The plaintiff's claim in essence is for the sum of RM3.25 million being consultancy fees pursuant to Consultancy Agreement dated 31 December 1999 entered into between the defendants and the plaintiff and six other consultants.

[3] The principal ground advanced by the defendant in opposing the plaintiff's application for summary judgment was that the plaintiff failed to fulfil their obligations and hence in breach of the terms of the Consultancy Agreement by failing to obtain the listing approval by 31 December 2001 and hence a triable issue arises – paras 8 and 9 of the defendant's affidavit in encl. 13.

[4] In answer to the defendant's argument aforesaid the plaintiff in para 9 of his affidavit in encl. 10 averred that the listing approval was obtained from the Securities Commission on 30 August 2000 and in para 7 of his further affidavit in encl. 16 he specifically avers that the delay was due to the inability of the defendants to comply with the listing approval conditions of the Securities Commission dated 30 August 2000 the inability of which necessitated three further revised approvals on 6 November 2000, 31 January 2002 and 13 November 2002.

[5] Upon evaluating the affidavit evidence it is my finding that the plaintiff have fulfilled his contractual obligation under the Consultancy Agreement by obtaining the approval of the Securities Commission on 30 August 2000 and that it was the defendant's inability to comply with the terms of approval that necessitated three further revised approvals and consequently the delay in the listing is squarely attributable to the defendant. I unreservedly accept the reasons for the delay as averred by the plaintiff in paras 7, 8 and 9 of encl. 16. It is also pertinent to emphasize that the averment of the plaintiff in para 7 of encl. 16 as regards the delay being occasioned by the defendant was never specifically denied by the defendant which failure tantamounts to an admission of the averment so made.

[6] It is trite law that a litigant ought not to benefit from its own wrong and that a party ought not to be permitted to take advantage of his own breach – see *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn. Bhd.* [1999] 3 CLJ 577; *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC.

[7] As regards the defendant's subsidiary argument that time is of the essence nevertheless in the factual matrix herein it cannot be denied that the defendant had continued to accept the performance by the plaintiff and other consultants until the listing of the company in Bursa Malaysia on 25 July 2003. By reason thereof time has become at large and time is no more in essence in the regulation of the parties contractual obligations. The fact that there was no letter of termination and the plaintiff being made a director of the listed company is further supportive that time is at large – see *Sim Chio Huat v. Wong Ted Fu* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363, *Hock Huat Iron Foundry v. Naga Tembaga Sdn. Bhd.* [1999] 1 CLJ 89.

[8] On the defendant's contention that the listing was done by them, to my mind is a bald contention devoid of particulars. It is trite law that defendant's averment must condescend with particulars see *John Walling Ford v. Director of Mutual Society* [1880] 5 AC 685. A scrutiny of the defendant's defence and particularly paras 5, 6 and 10 thereof and paras 10, 11 and 16 of defendant's affidavit in encl. 13 reveals the hollowness of the defendant's contention as it is devoid of particulars as to when and how they did the listing by themselves. The contention aforesaid is a sheer act of desperation to prop up an issue when none exists.

[9] On the question of the Hock Hua Bank cheque No. 873648 for RM5,250,000 to CRMC (Malaysia) Sdn. Bhd. which is undated and hence the defendant contends is irrelevant it is only appropriate to refer to the Consultancy Agreement in exh. HYT1 of encl. 10 wherein CRMC (Malaysia) Sdn. Bhd. was one of the Consultants named in the agreement. To my mind the payment of the cheque is relevant in that it signified the completion of the performance of the Consultancy Agreement by all the Consultants named therein including plaintiff.

[10] The cheque though made payable to cash is nevertheless a valid cheque – see *Yee Chow Fah v. Multihorizon Sdn. Bhd.* [1996] 6 MLJ 175 and similarly an undated cheque is a valid cheque – see s. 3(4)(a) Bills of Exchange Act 1949 and *Tan Chong Keng v. Vincent Lim Bak Keng* [1986] 2 MLJ 327.

[11] Again the defendant's averment in para 14 of encl. 13 that the cheques was not encashed and that the bank account of the defendant in Hock Hua Bank has been closed is but a bare averment devoid as to documentary proof of bank statements and other supporting documents. Surely the defendant as the issuer of the cheque is in a position to ascertain from its bank statements as to whether the cheque had been encashed and the payment and encashment thereof is solely within the knowledge of the defendant.

[12] By reason thereof the defendant's appeal herein is without any merits and consequently it is hereby dismissed with costs to be taxed in favour of the plaintiff.

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